No. 14088.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES T. LESTER, Administrator of the Estate of Harold Hugh Enfield,

Appellant,

vs.

NATIONAL BROADCASTING COMPANY, INC., PHILIP MORRIS & COMPANY, LTD., INC., and THE BIOW COMPANY, INC.,

Appellees.

APPELLEES' BRIEF.

Appeal From the United States District Court for the Southern District of California, Central Division.
(Mathes, D. J.)

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APPELLEES' BRIEF.

Jurisdictional Statement.

The present action is to vacate a judgment of the United States District Court, Southern District of California. Accordingly, that court had jurisdiction (*Lacassagne v. Chapuis,* 144 U. S. 119, 126).

The judgment herein was entered July 31, 1953 [R. 78, line 22]. The notice of appeal was filed August 28, 1953 [R. 79]. This court has jurisdiction under Section 1291 of Title 28, U. S. C.

Opinion Below.

The court below did not write an opinion. Agreeable to its local rule, Findings of Fact [R. 75, line 3, to 76, line 10] and Conclusions of Law [R. 76, lines 13-21] were signed by District Judge Mathes and filed.

(Because this case involves judgments and orders made by the late District Judge J. F. T. O'Connor and Judges Yankwich, Weinberger and Mathes, it will be necessary for us to mention the judges by name.)

Summary Statement.

Appellant, as administrator of the estate of Harold H. Enfield, deceased, brought this action to vacate and set aside a certain judgment against his intestate and in favor of appellees given by the late District Judge J. F. T. O'Connor in an action then pending in the Court below, entitled *"Enfield, et al. v. The Biow Company, Inc., et al.,"* No. 4616 in the files of said Court.

Similar relief was asked by petition and motions in said action 4616 and was denied by Judge Yankwich (now Chief Judge) on the merits and with prejudice [R. 106-107, 110]. Appellant's intestate, having moved to set aside Judge Yankwich's orders upon the ground that the case had not been properly transferred to him, later, in open court, retracted his application and was permitted by Judge Yankwich to withdraw his motion [R. 121].

In 1948 appellant's intestate brought a plenary action in the Court below entitled *"Enfield v. The Biow Company, Inc., et al.,"* No. 8288 in the files of the District Court for the same relief and upon the same grounds [R. 30-43]. A motion by the present appellees, defendants therein, for a summary judgment in their favor because of the bar of Judge Yankwich's orders, was

granted by Judge Weinberger, and a summary judgment entered [R. 57-58]. Appellant's intestate thereupon took an appeal to this Court (No. 12223) [R. 59]. Appellant's intestate failed to file his record, the appeal on motion was dismissed by this Court and in 1949 the mandate was filed in the Court below [R. 60-62].

In 1953, five years after the case was filed before Judge Weinberger and seven years after Judge O'Connor gave the judgment sought to be set aside, appellant brought the present action for the same relief and on the same claim [R. 2-22]. Appellees made a motion for a summary judgment upon the ground that Judge Yankwich's orders in 4616 and Judge Weinberger's judgment in No. 8288 were *res judicata* [R. 26-62]. Judge Mathes granted the motion [R. 73] and gave judgment for appellees [R. 77-78] from which appellant has appealed [R. 79].

In stating the case we shall follow as nearly as possible a strict chronological presentation of the facts.

Statement of the Case.

Proceedings Before Judge O'Connor in Action 4616.

On July 11, 1945, appellant's intestate commenced action No. 4616 against appellees [R. 4, line 14]. Trial was had and at the conclusion of the plaintiff's case, defendants therein, appellees herein, moved for a directed verdict on eight grounds and the motion was granted by Judge O'Connor on all eight grounds [R. 5, lines 4-8]. Judgment was entered on January 25, 1946 [R. 5, lines 8-13] and a new trial was thereafter denied.

On March 22, 1946, appellant's intestate filed a petition in action 4616 to vacate the judgment therein [R.

86-92] and at the same time filed an Affidavit of Prejudice against Judge O'Connor [R. 93-99].

In the affidavit of prejudice plaintiff's intestate alleged that affiant believed that Judge O'Connor

> "has a personal bias and prejudice in favor of The Biow Company, Incorporated, Philip Morris and Company, Ltd., Inc., and National Broadcasting Company, Inc., opposing parties * * *." [R. 93, lines 9-16].

Affiant gave as a reason for such belief that the complaint in action No. 4616 was for the alleged plagiarism of a radio program; that Judge O'Connor was the owner of seventy-five shares of the stock of Radio Station KMTR (not a party to the suit); that the law of radio was comparatively new; that there were comparatively few radio stations in the United States and that all court decisions respecting liability of radio stations were naturally followed closely by all stations as a guide in the running of their affairs [R. 96, lines 10-20].

The petition to vacate judgment filed the same day was based primarily on the same allegations. It averred that Judge O'Connor was disqualified from sitting in the trial on the cause in question under Section 20 of the Judicial Code [R. 88, lines 20-22].

On March 22, 1946, appellant's intestate served a notice of motion based on said petition

> "for an order vacating and setting aside the judgment entered herein on January 25, 1946, granting judgment for the defendants, on the ground same is void and for such other and further and different relief as to the Court may seem just and proper." [R. 100, lines 13-17].

Thereupon Judges Yankwich and O'Connor signed a written order transferring the cause to Judge Yankwich [R. 51].

Proceedings Before Judge Yankwich in Action 4616.

Defendants served and filed their answer to said petition, also the affidavit of Judge O'Connor and an affidavit of Frank P. Doherty, Esq. On April 1, 1946, said petition and motion came on regularly for hearing before Judge Yankwich, who, on April 11, 1946, signed findings of fact and conclusions of law directing that the petition to vacate the judgment and petition and motion, and all relief thereunder, or under either of them, "be denied on the merits and with prejudice" [R. 105, line 7].

Paragraphs 2 and 3 of the findings read as follows:

> "2. The averment of the affidavit of prejudice made and filed by plaintiff herein on March 22, 1946, that said Honorable J. F. T. O'Connor has a personal bias and prejudice in favor of the defendants herein, is untrue. Said Judge O'Connor did not have any bias or prejudice against or in favor of any of the parties to this action.
>
> "3. Neither KMTR Radio Corporation nor said Judge O'Connor was or is a party to the above entitled action, nor interested therein or in the outcome thereof, directly or indirectly. No one of defendants' alleged infringing programs was broadcast over Radio Station KMTR, and said radio station was and is not in any way connected with the present litigation. Radio Station KMTR is not affiliated with defendant, National Broadcasting Company, Inc., as a member of its network or otherwise." [R. 104, lines 7-21.]

The same day an order was made in accordance with the conclusions of law [R. 106-107].

On June 4, 1946, the appellant's intestate filed a second motion for an order vacating the judgment in action No. 4616 and the order denying the motion for new trial on the ground that the judgment and order were void [R. 108, lines 18-23]. This motion was made upon the theory that Judge O'Connor, by joining with Judge Yankwich in transferring cause No. 4616 to Judge Yankwich, had thereby judicially determined that he was disqualified. Judge Yankwich found that this was not true and concluded that the motion should be denied on the merits and with prejudice [R. 110, lines 15-19] and ordered that it be so denied.

In accordance with local rule 7, the form of this order was submitted to Jesse A. Levinson, the attorney for appellant's intestate, the plaintiff therein. He objected to the fact that the form of order provided that the motion was denied on the merits and with prejudice [R. 111, lines 16-21]. On June 19, 1946, Judge Yankwich considered this objection and overruled the same [R. 111, lines 22-24], and on June 20, the order was signed [R. 110, line 25].

On June 21, 1946, appellant's intestate filed a motion to vacate the proceedings before Judge Yankwich [R. 112-113] on the ground that the procedure prescribed by Section 21 of the United States Judicial Code for the designation or choosing of another judge was not followed [R. 112, lines 19-24]. It appears, however, from counsel's argument at the hearing on July 1, 1946 [R. 115, lines 3-6] that his principal ground was that the order transferring the cause from Judge O'Connor to Judge Yankwich was signed by Judges Yankwich and O'Connor,

but was not signed by Judge McCormick, the Senior Judge, and that, therefore, the transfer was not made in accordance with local rule 2(a). Judge Yankwich thereupon made a statement for the record that "not only did Judge McCormick approve this, but the transfer was made in his office with the three of us present" [R. 115, lines 18-19]. Thereupon, the attorney for appellant's intestate (the attorney for appellant herein) stated in open court that in view of the fact that Judge Yankwich had informed him that Judge McCormick did approve the transfer in the presence of Judges Yankwich and O'Connor, his application was withdrawn, unless Judge Yankwich preferred to deny it [R. 120, lines 21-25]. Counsel for defendants, appellees herein, asked that it be denied with prejudice [R. 121, lines 3-4]. Judge Yankwich, nevertheless, gave force to the retraxit of appellant's intestate and permitted counsel to withdraw the motion [R. 121, lines 5-6].

Proceedings Before Judge Weinberger in Action No. 8288.

On June 8, 1948, appellant's intestate filed a new complaint (action No. 8288) to set aside the judgment in action No. 4616 [R. 30-51]. To this complaint there were attached two exhibits: Exhibit A, the affidavit of prejudice [R. 44-50], and Exhibit B, the order transferring the action No. 4616 to Judge Yankwich [R. 51], both of which have heretofore been referred to in their chronological order.

Five causes of action were attempted to be stated: The first cause of action set out Judge O'Connor's ownership of seventy-five shares of stock of Radio Station KMTR and alleged that the judgment was void because of Judge O'Connor's disqualification. In the second cause

of action, plaintiff's intestate referred to the affidavit of prejudice against Judge O'Connor, averred that Judge O'Connor recused himself and joined with Judge Yankwich in transferring the matter to Judge Yankwich for hearing and determination. He further alleged that Judge O'Connor had judicially determined and ruled that he was disqualified [R. 38, lines 17-19]. For a third cause of action [R. 38-41], he pleaded the failure of Senior Judge McCormick to sign the order of transfer—the very matter which his counsel in open court had withdrawn two years previous. For a fourth cause of action [R. 41] he averred that the clerk did not reassign cause No. 4616 to another judge pursuant to the local rules. For a fifth cause of action [R. 41-42] his claim was that Judge O'Connor did not certify to the Senior Circuit Judge of this circuit an authenticated copy of his order of disqualification. In his prayer he prayed for a judgment and decree of this court vacating and setting aside the judgment in No. 4616 and declaring the same to be void and of no force and effect and for a judgment and decree of this court vacating and setting aside all orders made by Judge Yankwich and for general relief [R. 42, line 20, to R. 43, line 6].

On June 26, 1948, appellees herein, defendants in action No. 8288, filed a motion for summary judgment or in the alternative to dismiss on the ground that the orders made by Judge Yankwich in action No. 4616 constituted a bar to the action [R. 52-56].

On July 19, 1948, the matter came on before Judge Weinberger, who thereupon entered summary judgment for defendants [R. 57-58]. The court found that there was no genuine issue as to any material fact and no controversial question of fact to be submitted to the trial

court and concluded that defendants were entitled to judgement as a matter of law and adjudged that plaintiff take nothing by his action and that defendants be hence dismissed with their costs and disbursements therein expended [R. 58, lines 10-17].

On August 17, 1948, appellant's intestate appealed to this Court [R. 59]. The records of this Court, then undocketed but possibly now filed under No. 12223, disclose that appellant's intestate, having been denied by Judge Weinberger the right to appeal *in forma pauperis,* petitioned this Court for leave so to appeal, which was denied. Thereupon, he asked the Supreme Court of the United States for leave to petition for certiorari, and this was denied on March 28, 1949 (*Enfield v. Biow,* 336 U. S. 934). On April 25, 1949, the mandate of this Court was filed below [R. 60-62], and another stage of this litigation came to an end.

Proceedings Before Judge Mathes in No. 15612 (the Present Action).

On June 15, 1953, appellant, as Administrator of the Estate of Harold H. Enfield, deceased, filed a complaint [R. 2-22] to vacate and set aside Judge O'Connor's judgment and for general relief. The complaint contains many paragraphs of extraneous and entirely immaterial matters. Omitting formal allegations and those which are plainly irrelevant and immaterial we have the following allegations: Paragraph XI alleges that Judge O'Connor, at the time he presided, was the owner of seventy-five shares of the capital stock of KMTR Radio Corporation [R. 6]. Then follows three paragraphs—XII, XIII and XIV—setting out the business of appellees [R. 6 and 7]. The filing by appellant's intestate of a motion

to vacate the judgment on the ground of Judge O'Connor's disqualification [Par. XV, R. 7], and the filing of the affidavit of prejudice [Par. XVI, R. 7-8] are alleged. In Paragraph XVII the complaint alleges that the basis of the affidavit of prejudice was to the effect that Judge O'Connor was disqualified [Par. XVII, R. 8]. However, since a copy of the affidavit is in the record [R. 44-49; 93-99] the affidavit speaks for itself. Paragraphs XVIII to XX [R. 8 and 9] alleged that the Senior Judge did not approve in writing the order transferring Cause No. 4616 from Judge O'Connor to Judge Yankwich. Paragraphs XXI to XXXXIV [R. 9-13] all have to do with the sale of seventy-five shares of stock of the Radio Corporation to Judge O'Connor by Katherine Banning and her present situation. Appellant attempts to tie these allegations into the case by the further allegation that they were not known to plaintiff's intestate at the time of filing the affidavit of prejudice [R. 13, lines 3-5].

In Paragraph XXXI it is alleged that Judge O'Connor, at the time of the trial, was a close and intimate friend of Louis B. Mayer, a producer of motion pictures, and had been a close and intimate friend of Mayer's for a period of many years [R. 13]; that at parties given by said Louis B. Mayer, Judge O'Connor was often conspicuous as a guest and occasionally acted as master of ceremonies, and was often seen in the company of said Louis B. Mayer and Ginny Simms, star of appellees' radio show; that all of this was before and at the time of the trial of action No. 4616 before Judge O'Connor [Par. XXXII, R. 13]. It is further alleged that at the time of the trial, Louis B. Mayer was a close friend of Miss Ginny Simms, all of which was well known to Judge O'Connor [Par. XXXIII, R. 14]. In Paragraph

XXXIV there appears the allegation which appellant asserts is "the gravamen of plaintiff's complaint" (Br. p. 18, line 24). Upon information and belief, appellant alleges that:

> "as a result of pressure and undue influence, and otherwise, brought by said Louis B. Mayer upon said Judge J. F. T. O'Connor during and before the trial of the aforementioned cause No. *4161* O'C, plaintiff's intestate did not receive a fair, just and equitable trial in the aforementioned litigation, in that said Louis B. Mayer sought and received from said J. F. T. O'Connor, Judicial favor from said trial judge in relation to his decisions and rulings in favor of the defendants named in said cause of action. All of which, because of the close friendship of many years standing between said Louis B. Mayer and said Judge J. F. T. O'Connor, and the close friendship then existing between said Mayer and Miss Ginny Simms, star of defendant's radio show." [R. 14, lines 7-20.]

In Paragraph XXXVI it is alleged that plaintiff's intestate was unemployed in his chosen profession as an actor and was unable to prosecute the appeal from the judgment in action No. 4616. In Paragraph XXXVII it is alleged that plaintiff's intestate learned of the close friendship between Louis B. Mayer and Judge O'Connor and the close friendship between Miss Ginny Simms and Louis B. Mayer and decided to take action which "might be characterized as of a drastic nature in regard to the integrity of the Judgment in cause No. 4616 O'C * * *" [R. 16, lines 1-3].

Paragraphs XXXVIII to XXXXIX, inclusive [R. 16-20] go into unintelligible detail as to some family

quarrel concerning the administration of intestate's estate—a matter without the slightest relevancy whatever to this cause of action. Paragraphs L and LI [pp. 20-21] have to do with defendant Underwriters at Lloyds, London, who was not served and is not an appellee in this action. Paragraphs LII and LIII deal with that portion of the judgment which awarded costs and collection thereof after judgment. The prayer is that the judgment in action No. 4616 be vacated and set aside, that the judgment for costs be vacated and set aside, and that recovery in the amount thereof be had from defendant Underwriters at Lloyds, London [R. 22].

On July 9, appellees filed a motion for a summary judgment in their favor or in the alternative to dismiss the action on the ground that the complaint does not state a claim against them [R. 26-62]. The matter was noticed for hearing before Judge Mathes on July 20, 1953 [R. 29, line 7]. On July 31, 1953, Judge Mathes made an order granting the motion for summary judgment [R. 73] and signed and filed Findings of Fact and Conclusions of Law [R. 74-75].

The Findings of Fact find: that appellant's intestate filed the petition and motion in action No. 4616, on March 22, 1946, for the same relief asked for herein; that the Court on April 11, 1946, denied said petition and motion on the merits and with prejudice; that a second motion was made by plaintiff's intestate on June 3, 1946, in said action No. 4616, for the same relief; that the Court made an order denying said motion on the merits and with prejudice; that no appeal was taken from either of the orders and that they have long since become final; that plaintiff's intestate commenced action No. 8288 for

the same relief plaintiff is seeking herein; that judgment was entered therein that plaintiff take nothing by his action; that plaintiff took an appeal from said judgment to this Court, which dismissed said appeal and that all of the matters therein found are disclosed in the records of the Court and cannot be the subject of controversy [R. 75-76]. As Conclusions of Law the Court concluded that the order entered April 11, 1946, and the order filed June 20, 1946, both in said action No. 4616, and said judgment entered July 19, 1948, in action No. 8288, each constituted an absolute and conclusive bar against plaintiff's maintaining the action [R. 76].

The same day the Court entered a summary judgment for defendants that plaintiff take nothing by his action and that defendants recover costs taxed at $41.00 [R. 77-78]. From this judgment appellant has prosecuted this appeal [R. 79].

Questions Presented by This Appeal and Summary of the Argument.

There are two questions presented by this appeal.

The first question is whether the orders made by Judge Yankwich in action No. 4616 and the judgment made by Judge Weinberger in action No. 8288 are *res judicata* as to the present action.

The second question is whether the charges contained in the complaint are of sufficient substance to state a justiciable controversy.

In respect to the first question, it is our contention (a) that what is now asserted by appellant, namely that his intestate did not receive a fair, just and equitable

trial from Judge O'Connor because Judge O'Connor was a friend of Louis B. Mayer, who was a friend of Ginny Simms, who was the star of appellees' radio show, is nothing more than a reiteration of the claim first made by appellant's intestate in his affidavit of prejudice [R. 92, lines 14-17] annexed also as Exhibit A to the complaint in action No. 8288 [R. 44, line 25, to R. 45, line 2]; and (b) that Judge Yankwich's order in No. 4616 of April 11, 1946 [R. 106-107], made upon his finding that

> "Said Judge O'Connor did not have any bias or prejudice against or in favor of any of the parties to his action" [R. 104, lines 10-12]

and the judgment of Judge Weinberger in No. 8288 denying appellant's intestate any relief are conclusive bars to appellant's present action.

In respect to the second question, it is our contention that the charges in the complaint are flimsy and transparent and insufficient to state a justiciable controversy.

Specifically we shall urge:

(1) Where the relief sought, the parties, and the causes of action are the same, the prior orders or judgment are an absolute bar to the subsequent action. Judge Yankwich's orders in action No. 4616 and Judge Weinberger's judgment in action No. 8288 are *res judicata* as a bar against plaintiff's claim.

(2) The charges contained in the complaint are so flimsy and transparent as to be insufficient to state a justiciable controversy.

We shall argue the points in the order stated.

ARGUMENT.

I.

Where the Relief Sought, the Parties, and the Causes of Action Are the Same, the Prior Orders or Judgment Are an Absolute Bar to the Subsequent Action. Judge Yankwich's Orders in Action No. 4616 and Judge Weinberger's Judgment in Action No. 8288 Are Res Judicata as a Bar Against Plaintiff's Claim.

Cromwell v. County of Sac, 94 U. S. 351;

United States v. California and Oregon Land Co., 192 U. S. 355;

Baltimore S. S. Co. v. Phillips, 274 U. S. 316.

The California law is the same:

Olwell v. Hopkins, 28 Cal. 2d 147, 152, 168 P. 2d 972;

Krier v. Krier, 28 Cal. 2d 841, 843, 172 P. 2d 681.

In *Cromwell v. County of Sac, supra,* 94 U. S. 351, the Supreme Court held that a prior judgment against plaintiff that he had not given value for certain of defendant's bonds was not *res judicata* against him on other bonds of the same defendant. The Court stated the rule of law governing the doctrine of *res judicata* so clearly that its language has become the accepted rule. The Court said:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and

its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * * The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever."

94 U. S. 352-353.

In *United States v. California and Oregon Land Co., supra,* 192 U. S. 355, the United States brought an action against the land company claiming title and praying that certain patents under which the land company claimed be declared void. On March 29, 1893, a final decree was entered finding the facts to be as alleged by the land company including the allegation that the land company was a bona fide purchaser for value and dismissing the bill on that ground. Thereafter, the United States brought the present action praying, as in the previous action, that the patents to the same land be declared void. The land company's plea of the former adjudication was held to be bad and the trial court entered a decree declaring the

patents void. Mr. Justice Holmes, in delivering the opinion of the Supreme Court reversing the judgment in favor of the government, said:

> "On the general principles of our law it is tolerably plain that the decree in the suit under the foregoing statute, would be a bar. The parties, the subject matter and the relief sought all were the same. It is said, to be sure, that the United States now is suing in a different character from that in which it brought the former suit. There it sued for itself—here it sues on behalf of the Indians. But that is not true in any sense having legal significance. * * * The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means, that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish its own title to the fee."
>
> 192 U. S. 357-358.

In the previous action involved in *Baltimore S. S. Co. v. Phillips,* 274 U. S. 316, libellant Phillips was denied full indemnity by way of damages and was awarded the sum of $500.00 as the costs of maintenance and cure and this amount was paid and the decree satisfied. (*Phillips v. United States,* 266 Fed. 631.) In that action, the libellant had sued for damages on account of *defective appliances.* Thereafter, he brought the present action on the ground that it was the *negligent operation of the appliances* which caused his injury. A verdict was rendered for Phillips and the Court of Appeals affirmed

upon the ground that the second action was based upon a different cause of action. (*Baltimore S. S. Co. v. Phillips,* 9 F. 2d 902.) On certiorari the Supreme Court reversed. The Court said:

> "Here the court below concluded that the cause of action set up in the second case was not the same as that alleged in the first, because the grounds of negligence pleaded were distinct and different in character, the ground alleged in the first case being the use of defective appliances and, in the second, the negligent operation of the appliances by the officers and co-employees. Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.
>
> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. 'The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. "The *thing,* therefore, which in contempla-

tion of law as its *cause,* becomes a ground for action, is not the group of *facts* alleged in the declaration, bill, or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.*" ' *Chobanian v. Washburn Wire Company,* 33 R. I. 289, 302.

"The injured respondent was bound to set forth in his first action for damages every ground of negligence which he claimed to exist and upon which he relied, and cannot be permitted, as was attempted here, to rely upon them by piecemeal in successive actions to recover for the same wrong and injury."

274 U. S. 321-322.

It will be observed that the foregoing authorities emphasize the identity of the parties, the identity of the relief asked for, and the identity of the cause of action of the prior action with those of the subsequent action. These three identities are present in the case at bar.

1. The parties are the same. Appellant is in privity with his intestate. (*Fouke v. Schenewerk* (C. A. 5th), 197 F. 2d 234, 236; *Rochford v. Atkins,* 213 Mass. 368, 100 N. E. 669, 670.) The defendants in actions No. 4616 and No. 8288 are the appellees herein.

2. The relief in the two prior actions is identical with the relief asked for in the present complaint, as the following references to the record will demonstrate:

Motion of Appellant's intestate filed in 4616 on March 2, 1946 [R. 100, lines 13-17].

Paragraph 1 of the prayer of the complaint in 8288 [R. 42, line 20, to R. 43, line 1].

Paragraph 1 of the prayer of the complaint in the case at bar [R. 22, lines 7-14].

The second paragraph in the prayer of the complaint herein [R. 22, lines 15-21] asks that judgment for costs in 4616 be vacated and that recovery be had against a defendant not served and not appellee herein. The judgment for costs is an inseparable, although incidental, part of the judgment on the directed verdict, and if the judgment itself is not set aside, the portion thereof which awarded costs is not affected.

3. The causes of action are identical.

We may assume for the purpose of the argument that so far as the trial of the issues in action No. 4616 is concerned appellant's intestate had a single primary right, namely, that of having his cause determined by a judge who was not disqualified. If Judge O'Connor were disqualified either by bias, by prejudice, by interest or by relationship, then it may be assumed for the purposes of the argument that appellant's intestate had suffered a wrongful invasion of his right (not however by appellees) and, if application were timely made, the Court would vacate and set aside Judge O'Connor's judgment. But any alleged invasion of the right of appellant's intestate was a single wrongful invasion whether the acts constituting the wrongful invasion were one or many, simple or complex—whether the disqualifiation arose because of bias, or prejudice, or interest, or relationship, or any other cause of disqualification.

Appellant's intestate originally alleged the disqualification of Judge O'Connor on the grounds of bias and prejudice and interest, consisting of ownership of shares of stock of another radio station. Appellant, his administrator, has repeated these charges in the complaint in the present action elaborating on the alleged wrong by con-

tending that Judge O'Connor was disqualified under the theory of "guilt by association"—once removed.

The circumstance that in the present action an additional charge has been made does not prevent the former orders and judgment from being *res judicata* as a bar. Assuming these new charges rise to the dignity of allegations of fact, even so,

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show."
>
> *Baltimore S. S. Co. v. Phillips,* 274 U. S. 321, quoted at length *supra.*

Since the three identities, namely, parties, relief and cause of action are present it necessarily follows that Judge Yankwich's orders and Judge Weinberger's judgment are *res judicata* as a bar to this action.

The cases cited by appellant (Br. pp. 15-18) do not support his contentions. The language quoted from *United States v. International Building Co.,* 345 U. S. 502, clearly shows that the Court was speaking about a second action "upon a different claim or demand" (345 U. S. 504). The language quoted by appellant from *Cromwell v. County of Sac, supra,* 94 U. S. 351 (Br. p. 16), deals with a "different demand" (94 U. S. 356). In the case of *The Haytian Republic,* 154 U. S. 118, 128 (Br. p. 16), the Supreme Court held that merely because the same relief, namely, the forfeiture of a vessel, was asked for in two actions, was not sufficient to support the plea of a pending suit in the second action. In one suit, forfeiture of the vessel was sought because of the

smuggling of narcotics and the importation of Chinese at different places and on certain days and in the second suit because of the smuggling of other lots of narcotics and importing of other Chinese in other places and at other times.

In *De Sollar v. Hanscome,* 158 U. S. 216, the former action had been brought by the present defendant against the present plaintiff and, of course, the judgment could not be *res judicata as a bar* for the causes of action were necessarily different. The statement of the Court, correctly paraphrased in the brief at page 17, is a correct statement of the law of *res judicata* when, because the causes of action are different, the former adjudication is not a bar, but the matters actually decided raised an estoppel. Even if we assume that the cause of action or claim in the complaint herein is different from the cause of action in No. 4616 and No. 8288 Judge Yankwich's orders are *res judicata* as an estoppel that Judge O'Connor was not disqualified by bias, prejudice or stock interest in another radio station.

In *Baker v. Moody* (C. A. 5th), 204 F. 2d 918, one suit was brought by plaintiff in contract on one tract of land, and another suit was in tort on another tract of land. The Court of Appeals properly held there was no room for the application of the doctrine of *res judicata.*

Section 1911 of the Code of Civil Procedure of the State of California and the California cases cited by appellant in his brief, page 18, all have to do with the other phase of the doctrine of *res judicata,* namely, estoppel not as a bar, but as evidence where the causes of action are different.

II.

The Charges Contained in the Complaint Are so Flimsy and Transparent as to Be Insufficient to State a Justiciable Controversy.

Appellant asserts that the gravamen of plaintiff's complaint is found in Paragraph XXXIV. He says other allegations in the complaint are:

> "surrounding and lead up to and are part of a story in support of the claim of plaintiff" (Br. p. 18, line 24, to p. 19, line 1).

Paragraph XXXIV, upon which appellant relies so strongly, is quoted in the statement of the case, *supra,* page 11. The charge is that

> "plaintiff's intestate did not receive a fair, just and equitable trial in the aforementioned litigation" [R. 14, lines 10-12].

It is asserted that this was

> "a result of pressure and undue influence and otherwise brought by said Louis B. Mayer upon said Judge J. F. T. O'Connor during and before the trial of the aforementioned cause" [R. 14, lines 7-10].

This pressure is elaborated later in the paragraph by the statement:

> "in that said Louis B. Mayer sought and received from said J. F. T. O'Connor, Judicial favor from said trial judge in relation to his decisions and rulings in favor of the defendants named in said cause of action" [R. 14, lines 12-16].

The reason why Louis B. Mayer was able to exert pressure and undue influence upon Judge O'Connor and receive judicial favor from Judge O'Connor was:

> "because of the close friendship of many years standing between said Louis B. Mayer and said Judge J. F. T. O'Connor, and the close friendship then existing between said Mayer and Miss Ginny Simms, star of defendant's radio show" [R. 14, lines 16-20].

Apart from any application of the doctrine of *res judicata,* the complaint fails to state a claim upon which relief may be had. It will be recalled that Judge O'Connor's judgment, here sought to be set aside, was entered upon a directed verdict in favor of appellees on all eight grounds urged by appellees. The action of a trial court in directing a verdict does not raise any question of fact, but simply questions of law. If appellant's intestate had taken an appeal to this Court and if, as is now claimed, he did not receive a fair, just and equitable trial, the judgment would have been speedily reversed by this Court. Appellant is attempting to have Judge O'Connor's judgment set aside for errors which could have been corrected on appeal. The complaint attempts to excuse appellant's intestate for his failure to take the appeal because of the expense involved [Par. XXXVI, R. 14, lines 5-17] but this does not excuse appellant's intestate, or permit him or his administrator to relitigate the law suit.

Moreover, appellant's charge that "his intestate did not receive a fair, just and equitable trial" before Judge O'Connor is a mere conclusion of law. The charge that this was the result of pressure and undue influence is likewise a conclusion of law.

When appellant attempts to support these conclusions of law by the allegations of the close friendship between Louis B. Mayer and Judge O'Connor and the close friendship between Mr. Mayer and Miss Ginny Simms, star of defendant's radio show, these allegations of fact are so flimsy and transparent that they do not state a justiciable controversy.

The charge against Judge O'Connor is not substantially different from the charge made by the Sabins against the judge of the state trial court, who had foreclosed a mortgage of the Home Owners' Loan Corporation. The charge is considered in *Sabin v. Home Owners' Loan Corporation* (C. C. A. 10th), 151 F. 2d 541 (cert. den., 328 U. S. 840).

In the case cited, Home Owners' Loan Corporation brought an action against the Sabins in the state courts of Oklahoma to foreclose a mortgage. A judgment of foreclosure was given, and since the defendants did not give a stay bond the property was sold. Defendants appealed to the Supreme Court of Oklahoma, where it was there affirmed (187 Okla. 504, 105 P. 2d 245). The Sabins moved the state trial court to vacate the judgment because of the trial judge's disqualification. The motion was overruled. Thereafter, the Sabins commenced an action in the Federal District Court to quiet title to and recover possession of the property lost by the foreclosure proceedings. The District Court sustained defendant's motion for summary judgment and plaintiffs appealed. Of the four assignments of error, three had been considered and passed on by the Supreme Court of Oklahoma. As to them, the Circuit Court of Appeals said the summary judgment was properly entered.

The fourth assignment of error was that the judgment of foreclosure was void because of the disqualification of the state trial judge and because of fraud and overreaching. In respect to this assignment of error, the Circuit Court of Appeals said:

> "* * * While the question of the disqualification of the state trial judge has never been presented to an appellate court, it was tendered in the state district court where the judgment was entered by the appellants' motion to vacate the judgment because of the trial judge's alleged disqualification. He overruled the motion and refused to vacate the judgment. No appeal was taken from that ruling and it has long since become final, and the appellants may not litigate it a second time.
>
> "But even aside from that, the motion for summary judgment was nonetheless properly sustained as to this contention. The salutary purpose of Rule 56 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, is to permit speedy and expeditious disposal of cases where the pleadings do not as a matter of fact present any substantial questions for determination. Flimsy or transparent charges or allegations are insufficient to state a justiciable controvery requiring the submission thereof for trial. The only ground alleged to establish the disqualification of the trial judge was that at the time he considered this case he had a Home Owners' Loan Corporation mortgage on his home which was in default, and that by reason thereof he was overreached by the Home Owners' Loan Corporation. The statement that the trial court was overreached is a mere conclusion and not a statement of fact. This assignment of error does not merit any serious consideration or extended discussion. It is sufficient

to say that the manner in which the foreclosure action was tried by the trial judge was the issue in the appeal to the Oklahoma Supreme Court. All the questions now urged as to the admission of evidence or the other rulings of the trial court were urged then. The Supreme Court found no error in the manner in which the trial was conducted, and found that it had been in all respects in conformity with the law of the state. The charge that the trial judge was disqualified because he had a Home Owners' Loan Corporation mortgage which was in default is too gauzy to present a substantial question. The motion for summary judgment was properly sustained."

151 F. 2d 542.

The case of *Sabin v. Home Owners' Loan Corporation, supra,* not only demonstrates that the complaint herein does not state a claim upon which relief can be granted, but it also disposes of appellant's contention (Br. pp. 9-10) that a motion for summary judgment is not proper to test a complaint such as this one.

The case of *Root Refining Company v. Universal Oil Products Co.,* 169 F. 2d 514, cited by appellant (Br. pp. 21-22), has no factual resemblance to the case at bar.

It has been repeatedly said that it is the interest of the republic that there be an end to litigation. If appellant's theory be correct, if his complaint be invulnerable against a motion for summary judgment or to dismiss, the maxim may as well be erased from the books. There are probably very few cases ever decided where the losing party, or his administrator, could not truthfully allege that the trial judge was a friend of a friend of an employee of

the winning party. If, based on this fact, the conclusion of the pleader that the losing party did not receive a fair, just and equitable trial states a justiciable controversy for the vacating of the judgment, then no judgment is safe from attack. It seems patent that the complaint "is too gauzy to present a substantial question" (151 F. 2d 542).

Conclusion.

Judge Yankwich's orders in No. 4616 and Judge Weinberger's judgment in No. 8288 are *res judicata* as a bar to the maintenance of this action. In any event the complaint is insufficient to state a justiciable controversy requiring the submission thereof to trial. Judge Mathes was correct in granting appellees' motion for summary judgment.

We respectfully submit that the judgment should be affirmed.

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